BLANK PAGE

IN THE

Supreme Court of the United States

OCTOBER TERM 1940.

No. 15.

FLEISHER ENGINEERING & CONSTRUCTION CO., and JOSEPH A. BASS, doing business as JOSEPH A. BASS CO. *et al.*,

Appellants-Defendants in Court Below,
Petitioners,

vs.

UNITED STATES OF AMERICA for the use and Benefit of GEORGE S. HALLENBECK, doing business under the assumed name and style of HALLENBECK INSPECTION AND TESTING LABORATORY,

Plaintiff-Appellee in Court Below,
Respondent.

BRIEF ON BEHALF OF PETITIONERS IN CERTIORARI GRANTED ON REHEARING APRIL 22, 1940 (309 U. S. VII. 84 L. E. 738) TO REVIEW DECISION OF UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

FRANK GIBBONS,
Counsel for Petitioners,
Office & P. O. Address,
618-630 Walbridge Bldg.,
Buffalo, N. Y.

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

BLANK PAGE

INDEX

TOPICAL INDEX.

List of Cases.

STATUTES CITED.

Text Books Cited.

BLANK PAGE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 15.

FLEISHER ENGINEERING & CONSTBUCTION CO. and JOSEPH A. BASS, doing bu ness as JOSEPH A. BASS CO. *et al.*,

Appellants-Defendants in Court Below,
Petitioners,

vs.

UNITED STATES OF AMERICA for the use and benefit of GEORGE S. HALLENBECK, doing business under the assumed name and style of HALLENBECK INSPECTION AND TESTING LABORATORY,

Plaintiff-Appellee in Court Below,
Respondent.

BRIEF ON BEHALF OF PETITIONERS IN CERTIORARI GRANTED ON REHEARING APRIL 22, 1940 (309 U. S. VII. 84 L. E. 738) TO REVIEW DECISION OF UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT. (R. 73.)

Opinions Delivered in Courts Below.

1. Opinion of Hon. Augustus N. Hand in United States Circuit Court of Appeals, concurred in by Learned Hand and Swan, J. J. (R. 65-71). Published, 107F (2nd) 925.

2. Opinion of Hon. John Knight, D. J. in trial court. (R. 34), Published 30 F. Supp. 964.
3. Opinion of Hon. John Knight, rendered in U. S. District Court, Western District of New York, in companion case (R. 35-40), 30 F. Supp. 961.

Opinions Delivered in Other Cases in Conflict With Judgment in this Case.

1. Decision of United States Circuit Court of Appeals for the Sixth Circuit in U. S. A. for use etc. of Denie's Sons vs. Bass, *et al.*, 111 F (2nd) 965. See Exhibits C and D attached to petition for Rehearing, pages 6-11 thereof.

2. Decision of Mandelbaum, D. J. in United States District Court, Southern District of New York, in case of U. S. A. for use etc. of Morris Speckler Plumbing Supply Corporation vs. Albert Development Corporation, *et al.* Not published.

See Exhibit A attached to Petition for Certiorari, pages 11-12 thereof.

3. Decision of Murphree, D. J. in United States District Court for the Southern Division of the Northern District of Alabama. Not published. Appeal pending undetermined in U. S. Circuit Court of Appeals for the 5th Circuit.

See Exhibit B, attached to Petition for Certiorari. Pages 12-19 thereof.

Grounds of Jurisdiction.

1. The action was brought in the United States District Court for the Western District of New York under the so called Miller Act of August 24, 1935, Chap. 642, sections 1, 2, 3 and 4, 40 U. S. C. A. Sections 270 a, 270 b, 270 c and 270 d, to recover for labor and material furnished by use plaintiff, Hallenbeck, to a subcontractor in work required for construction of superstructure of Kenfield Housing Project H-6703 in Buffalo, N. Y., within said District, under a standard form of contract and government payment bond to the United States of America whereby the petitioners, Fleisher Engineering & Construction Co. and Joseph A. Bass, doing business as Joseph A. Bass & Co., were principals and petitioners, Maryland Casualty Company and Royal Indemnity Company were sureties. (R. 4-9.) Judgment was for plaintiff. (R. 55.)

2. On appeal to the United States Circuit Court of Appeals for the Second Circuit, the judgment of the District Court was affirmed. (R. 71 and 72.)

3. Jurisdiction of the Supreme Court to review is invoked under Judicial Code, sec. 240 (a), 28 U. S. C. A. 347, as amended by Act of February 13, 1925, c. 229, sec. 1.

Statement of the Case.

The use plaintiff, respondent here, furnished labor and material to Easthom-Melvin Co. Inc., a subcontractor of the principal obligors in the bond above mentioned, used in the performance of their contract with

the government (R. 7) for which Easthom-Melvin Co. Inc. have not made payment. (R. 22.)

The defense alleged in the separate answers of each of the petitioners is that no sufficient notice under the provisions of the Miller Act was given to the original contractors, the petitioners, Fleisher Engineering & Construction Co. and Bass. (R. 13, 17, 21 and 68.)

Interrogatories pursuant to Rule 33 of the Rules of Civil Procedure were filed and served. (R. 26-28.)

Respondent (plaintiff) filed and served answers thereto, (R. 29-31) setting forth that the written document (R. 30-31) was sent to Fleisher Engineering & Construction Co. only (R. 29, fol. 85) by ordinary mail (R. 29, fol. 86) and not by registered mail.

The document thus sent was directed not to either of the petitioners but to C. Leslie Weir, Project Engineer (R. 30, fol. 89) who represented the government. (R. 43, fol. 129.) A copy of that document was the alleged notice mailed to petitioner, Fleisher Engineering & Construction Co. (R. 43 and 44.)

The petitioners thereupon moved in the District Court for a summary judgment dismissing the complaint, which was denied (R. 33) with an opinion (R. 34), adopting an opinion in a companion case decided at the same time. (R. 35-40.) The plaintiff (respondent here) thereupon moved for a summary judgment which was granted (R. 53-54.) Judgment was entered accordingly. (R. 55.) On appeal to the United States Circuit Court of Appeals the judgment of the District

Court was affirmed by the judgment now under review before this court. (R. 71-72.) The opinion of that court per Hon. Augustus N. Hand, is in the record. (R. 65-71) and 107 F (2nd) 925.

Assigned Errors to be Urged.

All errors assigned are pertinent. (R. 56 and 57.)

1. Petitioners' (defendants') motion for summary judgment should have been granted, not denied. (R. 33.)

2. Respondent's (plaintiff's) motion for summary judgment should have been denied, not granted. (R. 53-55.)

Abstract.

The only question before this court must be determined by a construction of the Miller Act with respect to the sufficiency of notice required to be given by "any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor" in order to enable him to recover upon the contractor's payment bond.

That presents a question of law only.

The Miller Act, so far as pertinent, reads as follows:

> "Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect to which a payment bond is furnished * * * and who has not been paid in full therefor before the expiration of a period

> of ninety days after the day on which the last of the labor was done or performed by him or material furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or balance thereof, unpaid at the time of institution of such suit and to prosecute such action to final execution and judgment for the sum or sums justly due him; provided, however, that any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said contractor within ninety days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material for which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done and performed. Such notice shall be served by mailing the same by registered mail, postage prepaid, in an envelope addressed to the contractor at any place he maintains an office, or conducts his business, or his residence, or in any manner in which the United States Marshal of the District in which the public improvement is situated is authorized by law to serve summons."
>
> Act of August 24, 1935, Chapter 642, sec. 2, 49 Stat. 794; 40 U. S. C. A. 270 b.

The right of action is created by the statute. The remedy, the jurisdiction and procedure is also prescribed in detail.

The only notice claimed and the manner of its service is described by the use plaintiff as follows:

Firstly, in his answers to interrogatories,

to the effect that the notice was directed to the project engineer for the government, a copy being

set forth (R. 29, fol. 86, R. 30, fol. 89) sent by "ordinary mail."

Secondly, in his affidavit, a little more clearly, he said:

> "That on or about the 3rd day of June, 1937, the plaintiff wrote to Mr. C. Leslie Weir, who was the project engineer representing the government, in charge of said project, as per copy of letter hereto attached and made a part of this affidavit. (R. 51-52.) That the plaintiff also mailed a copy of said letter to the defendant, Fleisher Engineering & Construction Co., by depositing said copy in a Post Office Box maintained by the United States government as a receptacle for mail in the vicinity of plaintiff's office on Pearl Street in the City of Buffalo, N. Y. on the 3rd day of June, 1937, which notice was addressed, in a postpaid wrapper, to the said defendant, Fleisher Engineering & Construction Co. at Langfield Drive. Buffalo, N. Y., and your deponent, on or about the 5th day of June, 1937, received a reply from Mr. C. Leslie Weir, as per copy of letter attached and made a part hereof." (R. Pages 43-44,52, fols. 129-130.)

This so called Miller Act is the successor to the Heard Act so called. Many of the provisions contained in the two acts are identical. So far as pertinent to the matter now under discussion the Heard Act reads as follows:

> "Sec. 270. BONDS OF CONTRACTORS FOR PUBLIC BUILDINGS OR WORKS: RIGHTS OF PERSONS FURNISHING LABOR AND MATERIALS. Any person or persons entering into a formal contract with the United States for the construction of any public building, or the prosecution and completion of any public work, or for repairs upon any public building or public work, shall be required, before commencing such work, to execute the usual penal bond, with good

and sufficient sureties, with the additional obligation that such contractor or contractors shall promptly make payments to all persons supplying him or them with labor and materials in the prosecution of the work provided for in such contract; and any person, company, or corporation who has furnished labor or materials used in the construction or repair of any public building or public work, and payment for which has not been made, shall have the right to intervene and be made a party to any action instituted by the United States on the bond of the contractor, and to have their rights and claims adjudicated in such action and judgment rendered thereon, subject, however, to the priority of the claim and judgment of the United States. * * * If no suit should be brought by the United States within six months from the completion and final settlement of said contract, then the person or persons supplying the contractor with labor and materials shall, * * * be, and are hereby, authorized to bring suit in the name of the United States in the district court of the United States in the district in which said contract was to be performed and executed * * * for his or their use and benefit, against said contractor and his sureties, and to prosecute the same to final judgment and execution: Provided, That where suit is instituted by any of such creditors on the bond of the contractor, it shall not be commenced until after the complete performance of said contract and final settlement thereof, and shall be commenced within one year after the performance and final settlement of said contract, and not later: And provided further, That where suit is so instituted by a creditor or by creditors, only one action shall be brought, and any creditor may file his claim in such action and be made party thereto within one year from the completion of the work under said contract, and not later. * * * Provided, Further, that in all suits instituted under the provisions of this section such personal notice of the pendency of such suits, informing them of their right to intervene as the court may order, shall be given to all known creditors, and in addition there-

to notice of publication in some newspaper of general circulation, published in the State or town where the contract is being performed, for at least three successive weeks, the last publication to be at least three months before the time limited therefor."

Act of February 24, 1905, Chapter 778 as amended by the Act of March 3, 1911, Chapter 231, Sec. 291, 40 U. S. C. A. 270.

While the Heard Law contains no provision making notice an element in the creation of the right of action, nevertheless the other requirements as to time within which the suit can be brought and the time within which it cannot be brought, and the manner in which it must be brought have all been held to be matters which must be strictly followed in order to create the cause of action, and in that respect are similar in all respects to like provisions contained in the Miller Act and would require the matter of notice provided for in the Miller Act to be construed in the same way.

It is our contention that in order to enable a creditor of a subcontractor whether laborer or materialman to recover in a situation like this, he must among other things prove the following, viz:

1. That written notice was served on the general contractor by registered mail within ninety days stating certain definite things, or

2. That written notice was served on the general contractor within ninety days stating certain definite things by any method by which the United States Marshal of the District was authorized to serve summons.

3. That the aforesaid notice was given to the contractor.

This broken down means that the notice in question being statutory must be served in the way in which the statute directs it.

If served by mail (as was attempted to be done in this case), it must be served by registered mail.

The act of mailing and of registration completes the service of the notice regardless of whether the addressee actually receives the letter or not.

The court below has held that notice sent by ordinary mail was sufficient. (R. P. 68-69). The fact that the notice was directed to the "Project Engineer", an employee of the government (R. P. 30, fol. 89), instead of to the contractor was not mentioned by the court.

The history of legislation and judicial construction of the statutes on this subject may be found in a very learned and clearly written article by Edward H. Cushman published in Dickinson's Law Review, Volume XLI, No. 1, pages 1-25, October, 1936.

BRIEF OF ARGUMENT.

POINT I.

Before we proceed with our argument, it may be well to invite attention to the mischief which was caused by the Heard Act and which was sought to be rem-

edied by the Miller Act, and then to the means adopted for that purpose.

1. Under that act the laborer, or material man, whose claim was just, even undisputed, was often delayed in its enforcement for a long period of time while waiting for the final settlement of the contract to take place and for the expiration of the time thereafter granted to the government exclusively to sue on the bond and for litigation of other claims to be terminated. Two bonds were, therefore, provided for. Each laborer, or material man, can now sue, if unpaid after ninety days after the time he last furnished labor or supplied material, under the payment bond and have his rights promptly determined.

2. Under the Heard Act, the subcontractor might be paid in full, before the contractor, or his surety, became aware of the claim against the subcontractor and the contractor be compelled thereafter to pay again notwithstanding.

Hill vs. American Surety Co., 200 U. S. 197; 50 L. E. 437.
Mankin vs. U. S., 215 U. S. 533; 54 L. E. 315.
Smith vs. Mosier, 169 Fed. Rep. 430.

To prevent that injustice the Miller Act gave a right of action upon the payment bond only upon the contingency of notice. To avoid any controversy as to whether notice was sufficient, it required the notice to be "written", so that its construction would be a matter of law, thus preventing the all too frequent controversies over what was said at a given time, who said it and to whom it was said.

While the written notice can be sent by mail as a substitute for personal delivery, the mailing of it must be rendered as certain as possible. The actual receipt of it by the contractor after mailing is not essential. For that reason registration is a reasonable requirement. If the rule declared by the court below shall prevail, it will amount to the nullification of these provisions of the law. It cannot prevail except on the theory that the receipt of notice in some other way than that directed shall be sufficient. If that is true, it must follow that any actual knowledge acquired by any means by the contractor will establish liability, thus restoring all of the controversies which Congress has attempted to eliminate.

It is perfectly apparent that a claimant may testify that he mailed the notice by ordinary mail, or that he gave oral notice. The contractor may deny the oral notice or the receipt of the written notice by mail. It would prove a fruitful field of litigation over questions of fact which must often produce an unjust result. Proof of registration is easy to make. The registry receipt is practically conclusive. It reduces an uncertainty so far as humanly possible. It is not in any way an unreasonable requirement under the circumstances. The claimant is afforded an excellent security unknown to the common law without cost or expense to himself. He has all of the rights possessed prior to the enactment of the statute to deny or extend credit to his customer according to his best judgment. The act permits him, at his discretion, to shift his burden to the contractor and his surety, by a very plain and easy method prescribed in detail. To place this new and additional burden first created by the Heard Act and

unknown to the common law upon the contractor, Congress did not require (although it might have done so) that the written notice should be actually received by the contractor. The act of mailing was all that was required. Congress did require as a condition for the receipt of this very valuable and newly created right that the mailing must be such that it can be established by the ordinary registry receipt, relieving the contractor, so far as possible, from the hazards incident to false testimony of mailing and the claimant, as well, from the hazard of false testimony of non-receipt.

This is emphasized in this case because the notice was not addressed to the contractor at all but to a government employee viz. to "C. Leslie Weir, Project Engineer" (R. pages 30 and 51, fols. 89 and 152, pages 43, fol. 129). The document merely invoked the assistance of the engineer and did not in any way make any claim or demand as against the contractor.

Registered mail is regarded by the recipient as mail of more than ordinary importance. Usually, only responsible and trusted employees are authorized by the employer to open letters received by registered mail. There is little possibility that the import of letters received by registered mail will be overlooked or that letters received by registered mail will not come to the attention of persons in authority in an organization. However, the receipt by ordinary mail of a carbon copy of a letter addressed to a third party is apt to be regarded as a routine matter and its import lost. The words "registered mail" as used in the Miller Act were used advisedly.

"The giving of notice by return-receipt registered mail is far more impressive than ordinary mail, and will commend more attention. But the provisions of the statute constitute a sufficient reason for the rule of construction. Certainly it is not an unreasonable requirement, and we think courts would not be justified in saying that its requirements should not be met. The Legislature appeared to make a distinction between ordinary mail, which under ordinary circumstances is sometimes difficult to prove, and return-receipt registered mail, which provides a complete chain of proof."

Hibbler-Barnes Company against Mark K. Wilson & Company.

(Decision of the Court of Appeals of the State of Tennessee under date of June 25, 1940, not yet published but the opinion is set forth in full in the appendix to this brief. *Infra* pages 46 *et seq.* Quotation from page 58 &.)

Point II.

The cause of action alleged in the complaint is strictly statutory. It is entirely foreign in every way to anything contained in the common law. If recovery is had it must be upon the terms, conditions and contingencies set forth in the statute itself. Something which may be just as good as that prescribed will not do.

The strict construction of the procedural provisions of the Heard Act so far as jurisdictional matters are concerned has been so well and so often declared that it is no longer open to argument.

"By this statute a right of action upon the bond is created in favor of certain creditors of the contractor. The cause of action did not exist before and is the creature of the statute. The act does not place a limitation upon a cause of action theretofore existing but creates a new one upon the terms named in the statute. The right of action given to creditors is specifically conditioned upon the fact that no suit shall be brought by the United States within the six months named, for it is only in that event that the creditors shall have a right of action and may bring suit in the manner provided. The statute thus creates a new liability and gives a special remedy for it, and upon well settled principles the limitations upon such liability become a part of the right conferred, and compliance with them is made essential to the assertion and benefit of the liability itself."

U. S. *ex rel.* Texas Portland Cement Co. vs. McCord, 233 U. S. 157, 162, 58 L. E. 893, 897.

Another leading case which was decided in the Eighth Circuit Court of Appeals says this:

"The statute created a new legal liability with a right to a suit for its enforcement, provided the suit was brought within one year after the performance and final settlement of the contract and not later. The time within which the suit must be brought operates as a limitation of the liability itself and not of the remedy alone. It is a condition attached to the right to sue at all. Time has been made of the essence of the right and the right is lost if the time is disregarded. The liability and the remedy are created by the same statute and the limitation of the remedy is, therefore, to be treated as a limitation of the right."

U. S. for use of Gibson Lumber Co. vs. Boomer, 183 Fed. Rep. 726, 730.

Cited and approved:

Illinois Surety Co. vs. U. S., 240 U. S. 214, 223, 60 L. E. 609, 615.

Another case holding the same rule arose in the Third Circuit Court of Appeals and was affirmed by the United States Supreme Court.

Miller vs. American Bonding Co., 262 Fed. Rep. 103, affd. 257 U. S. 304, 307, 66 L. E. 250, 252.

Following the McCord case and the Boomer case, the Eighth Circuit Court of Appeals have said:

> "The act creates new liabilities and rights and the limitations specified are integral parts thereof. It necessarily follows that compliance therewith is essential to the assertion of the rights conferred."

Antrim Lumber Co. vs. Hannan, 18 F. (2nd) 548.

This is an application of a well established principle of law to this particular statute. The rule was well established as long ago as 1886 in an admiralty case which denied a right to recover damages by reason of death on the high seas caused by negligence. The action was brought after the expiration of the time within which it was allowed by the terms of the statute invoked. On this subject Mr. Chief Justice Waite said:

> "The statutes create a new legal liability, with the right to a suit for its enforcement, provided the suit is brought within twelve months, and not otherwise. The time within which the suit must be brought operates as a limitation of the liability itself as created, and not of the remedy alone. It is a condition attached to the right to sue at all. No one will pretend that the suit in Pennsylvania,

or the indictment in Massachusetts, could be maintained if brought or found after the expiration of the year, and it would seem to be clear that, if the admiralty adopts the statute as a rule of right to be administered within its own jurisdiction, it must take the right subject to the limitations which have been made a part of its existence. It matters not that no rights of innocent parties have attached during the delay. Time has been made of the essence of the right and the right is lost if the time is disregarded. The liability and the remedy are created by the same statutes, and the limitations of the remedy are, therefore, to be treated as limitations of the right."

Steamer Harrisburg vs. Richards, 119 U. S. 199, 214, 30 L. E. 358, 362.

Further exemplification and application of the rule is found in

Middletown Nat. Bank vs. T. A. A. & N. M. Ry. Co., 197 U. S. 394, 49 L. E. 803.

Fourth National Bank vs. Francklyn, 120 U. S. 747, 30 L. E. 825.

Pollard vs. Bailey, 87 U. S. 520, 22 L. E. 376.

All of the lastly cited cases deal with the statutory liability of stockholders of a corporation for the debts of the corporation. It is stated in the Pollard case and quoted with approval in the Francklyn case, that "The individual liability of stockholders in a corporation for the payment of its debts is always a creature of statute. At common law it does not exist. The statute which creates it may also declare the purposes of its creation and provide for the manner of its enforcement."

The Middletown Bank case is authority for the same rule, but expressed in language only slightly different.

The provision of such a statute cannot even be waived. Davis vs. Henderson, 266 U. S. 92, 69 L. E. 182.

In the Miller act the terms, conditions and contingencies upon which liability may be established in favor of one who has no contractual relations with the principal obligee in the bond are clearly and distinctly set forth. Among them are the following:

1. Written notice must be given to the contractor within ninety days from the date on which the claimant performed the last item of labor or furnished the last item of material.

2. "Such notice shall be served by mailing the same by registered mail, postage prepaid, in an envelope addressed to the contractor. * * *"

The other methods of service provided for are not important in this case.

The court below, in its opinion recognizes that the element of notice (R. 68 and 69) is determinative of the right to recover in this case. That court then lifted from the context of the statute the single sentence "such notice shall be served by mailing the same by registered mail etc." and declared that inasmuch as the document was received "the mode of transmission becomes unimportant and the provisions as to mode of delivery should be regarded as directory and not mandatory" (R. 69). "The apparent purpose of providing for notice by 'registered mail' was" we are sure much more than to insure delivery. The more important purpose was to provide a means of service

which could be proved, or disproved, with certainty and facility. In simple fact the actual receipt of the notice is wholly unimportant because service is complete when the notice is mailed.

The Circuit Court of Appeals wrongly defines this statute as "remedial" (R. 69) *i. e.* corrective of some former imperfect right, whereas in fact it creates a new and theretofore unheard of right. Liberal construction, which would abolish a plain requirement of the act, is claimed to be within the authority of

A. Bryant Co. vs. N. Y. Steam Fitting Co., 235 U. S. 327, 387, 59 L. E. 253.

The Sixth Circuit Court of Appeals has arrived at exactly the opposite conclusion, citing and quoting from the McCord case (*supra*) as a controlling and exact authority. It is also held by that court that the Bryant case (*supra*) cited by the court below in this case "does not militate against this conclusion."

U. S. A. for use of Denie vs. Bass, 111 F. (2nd) 965, (set forth in full on pages 6 and 7 of our petition for rehearing herein).

Actual knowledge of the claim by the contractor in the Denie case was found as a fact by the court. (See Finding No. 8 on page 8 of our said petition.) The record also showed informal written notice of it. (See pages 9 and 10 of said petition.)

It is submitted that the Sixth Circuit Court of Appeals is right in its interpretation of the Bryant case as being inapplicable. Although that court rightly (as

we see it) thought that such inapplicability was self-evident, nevertheless out of respect for the learned court whose decision is now under review, we submit the following reasons which occur to us for such a ruling.

The notice to creditors under the Heard Act under consideration in the Bryant case was not a jurisdictional matter, but merely a procedural matter in a case of which the court had already acquired jurisdiction, the directions in respect to which were vague and conflicting in some parts and impossible of performance in others. The court undertook to find out the intention of Congress and then to follow it. That act made jurisdiction depend upon three distinct provisos or conditions.

1. The action must not be commenced until the expiration of the six months period within which the United States could sue.

2. The suit must be brought after that period had expired and within one year after performance and final settlement of the contract.

3. Only one action could be brought but creditors could intervene.

After the suit had been brought in accordance with these prescribed conditions the court had jurisdiction and might order notice to "known creditors" to some extent according to its discretion. The court had before it for consideration these procedural provisions with the limitation imposed upon it by the jurisdictional conditions.

The numerous ambiguities in the Heard Act are best shown in the language of the court itself, as follows:

> "The Act of Congress is undoubtedly ambiguous. Indeed, considering the letter only of the three provisos with which we are concerned, they absolutely repel accommodation. We must try, however, to give coherence to them, and accomplish the intention of Congress." * * *
>
> "By the first proviso of the act a creditor cannot institute suit until after the complete performance of the contract and its final settlement; but after such events he may do so (the United States not having sued) within one year from their fulfillment. This is clear enough. The next proviso introduces ambiguity. 'Only one action shall be brought', is its provision, in which 'any creditor may file his claim * * * and be made a party thereto *within one year from the completion of the work, and not later.*' The words in italics are disturbing. 'This right to intervene and file a claim, conferred by the statute, presupposes an action duly brought under its terms.' United States *ex rel.* Texas Portland Cement Co. vs. McCord, 233 U. S. 157, 163, 58 L. Ed. 893, 897, 34 Sup. Ct. Rep. 550. But by its terms the instituting creditor has one year from the designated events to commence his action. If he file it on the last day of the designated time, what then becomes of the rights of other creditors who must file their claim within the same limit of time, and not later? The question is not easy to answer and any answer may be disputed. It presents a puzzle for judicial resolution apparently insolvable.
>
> There is more ambiguity when we bring forward the next, and third, proviso. Notice of the suit must be given to creditors personally if they be known, and by publication besides, informing them 'of their right to intervene as the court may order.' Passing what the quoted words may mean, and coming to the requirement of notice, it is provided that it must be 'for at least three successive weeks the last publication to be at least three months before the time limited therefor.'

> This seemingly brings us to an impasse. How can the instituting creditor (so called for convenience) have a year to commence his suit and yet give the notice required—and it is to be remembered that the intervening creditor must file his claim also within a year.'' * * *
>
> ''It is urged that it is a consequence of our construction that an action may be commenced on the last day of the year, and that all opportunity for intervention may be precluded; for, counsel say, 'intervention cannot be conducted in a day,' and it would seem as if the act intended 'to afford creditors an interval of three month within which to secure an intervention.'
>
> Even if this be the consequence, some of the provisions of the act, as we have intimated, must give way. We can only select those which we consider the fittest to prevail to accomplish the purposes of the statute.''

In the construction of such an ambiguous statute the court followed the ordinary method to ascertain the legislative intent. That is all that the Bryant case means.

> Hamilton vs. Rathbone, 175 U. S. 414, 419, 44 L. E. 219, 221.

The district courts in the Southern District of New York and in the Southern Division of the Northern District of Alabama prior to the decision now under review and prior to the decision of the Denie case (*supra*) held that the provision of the statute as to service of notice by registered mail was mandatory and essential to the creation of the right of action.

> U. S. A. for use etc. of Morris Spreckler Plumbing Supply Corp. vs. Albert Development Co.

(Opinion not reported. See Exhibit A attached to our petition for certiorari, pages 11 and 12.)

U. S. A. for use etc. of Birmingham Slag Co. vs. Perry (not reported, See Exhibit B attached to our said petition, pages 12-19 appeal pending undetermined in the U. S. Circuit Court of Appeal for the 5th Circuit).

The Court of Appeals of the State of Tennessee under date of June 25, 1940, rendered a decision construing the Tennessee Statute, therein quoted, similar in principle to the proposition now before the court, though converse thereto Hibbler-Barnes Co. vs. Wilson (not yet published, but opinion set forth in full in the appendix to this brief. See *infra*, pages 46 *et seq.)*

Point III

There is no ambiguity in the Miller Act.

> "Every person who has furnished labor or material in the prosecution of the work * * * shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of the institution of such suit and to prosecute said action to final execution and judgment for the sum or sums justly due him: *Provided*, however, that any person having * * * no contractual relationship * * * with the contractor * * * shall have a right of action upon said payment bond upon giving *written* notice. * * * Such notice shall be served by mailing the same by registered mail * * *."

No words could be plainer.

Where the words of the statute are clear, the meaning is plain and there is no other provision of the same

statute or other pertinent statute in conflict therewith, the duty of the court is to follow the language of the statute and assume that Congress meant just what it said. The Supreme Court has spoken forcibly and clearly in various situations as to the construction of different statutes. In 1889 Mr. Justice Lamar said:

> "We are unable to adopt the constructive interpolations ingeniously offered by counsel for defendant in error. Why not assume that the framers of the Constitution, and the people who voted it into existence, meant exactly what it says? At the first glance, its reading produces no impression of doubt as to the meaning. It seems all sufficiently plain; and in such case there is a well settled rule which we must observe. The object of construction, applied to a Constitution, is to give effect to the intent of its framers, and of the people in adopting it. This intent is to be found in the instrument itself; and when the text of a constitution provision is not ambiguous the courts, in giving construction thereto, are not at liberty to search for its meaning beyond the instrument.
>
> To get at the thought or meaning expressed in a statute, a contract or a Constitution, the first resort, in all cases, is to the natural signification of the words, in the order of grammatical arrangement in which the framers of the instrument have placed them. If the words convey a definite meaning, which involves no absurdity nor any contradiction of other parts of the instrument, then that meaning, apparent on the face of the instrument, must be accepted, and neither the courts nor the Legislature have the right to add to it or take from it. (Newell vs. People, 7 N. Y. 9; Hills vs. Chicago, 60 Ill. 86; Denn vs. Reid, 35 U. S. 10 Pet. 524 (9 L. E. 519); Leonard vs. Wiseman, 31 Md. 204; People vs. Potter, 47 N. Y. 375; Cooley, Const. Lim. p. 57; Story, Const. sec. 400, Vol. I, p. 305; Beardstown v. Virginia, 76 Ill. 34). So, also, where a law is expressed in plain and unambiguous terms whether those terms are general or limited,

the Legislature should be intended to mean what they have plainly expressed, and consequently no room is left for construction. (United States vs. Fisher, 6 U. S. 2, Cranch, 358, 399 (2 L. E. 304; 317); Doggett vs. Florida R. R. Co., 99 U. S. 72 (25 L. E. 301))."

Board of Lake Co. Commissioners vs. Rollins, 130 U. S. 662, 32 L. E. 1060, 1063.

"We are not at liberty to construe any statute so as to deny effect to any part of its language. It is a cardinal rule of statutory construction that significance and effect shall if possible be accorded to every word."

Washington Market Company vs. Hoffman, 101 U. S. 112; 25 L. E. 782.

The opinion in the last mentioned case was written by Mr. Justice Strong and immediately following the foregoing quotation he quoted from Bacon's Abridgement, sec. 2 as follows:

"'A statute ought upon the law to be so construed that, if it can be prevented, no clause, sentence, or words shall be superfluous, void or insignificant.' This rule has been repeated innumerable times."

In 1914 Mr. Justice Day in obedience to the foregoing authorities refused to eliminate any of the words contained in subdivision 5 of section 7 of the Act of June 30, 1906, known as the Pure Food and Drugs Act, which provided that food should be deemed to be adulterated if it contained any "added poisonous or other added deleterious ingredient *which may render such article injurious to health.*"

The italicized words were held to be clearly expressive of the meaning of Congress and could not be eliminated.

U. S. vs. Lexington Mill & Elevator Company,
232 U. S. 399, 410; 58 L. E. 658, 662.

As late as 1930 Mr. Justice Sutherland summed up the law on the subject in the following language:

> "Courts have sometimes exercised a high degree of ingenuity in the effort to find justification for wrenching from the words of a statute a meaning which literally they did not bear in order to escape consequences thought to be absurd or to entail great hardship. But an application of the principle so nearly approaches the boundary between the exercise of the judicial power and that of the legislative power as to call rather for great caution and circumspection in order to avoid usurpation of the latter. (Monson vs. Chester, 22 Pick, 385, 387.) It is not enough merely that hard and objectionable or absurd consequences, which probably were not within the contemplation of the framers, are produced by an act of legislation. Laws enacted with good intention, when put to the test, frequently, and to the surprise of the law maker, himself, turn out to be mischievous, absurd, or otherwise objectionable. But in such case the remedy lies with the law making authority, and not with the courts," citing many authorities.
>
> Crooks vs. Harrelson, 282 U. S. 55, 60; 75 L. E. 156, 175.

Congress, therefore, meant that the right of action could only be created by notice, that the notice must be written and that if sent by mail it must be registered mail. Any other notice, or knowledge gained by any other means whatsoever, was no notice at all.

The court below recognized that this right of action was contingent upon notice, (R. 68), but that if the document was received by mail the requirement for registration was unimportant.

It is difficult to understand why registration is not an integral part of the condition. If one can dispense with registration he can dispense with any other requirement such as prepayment of postage, enclosing in an envelope, or even addressing the envelope to the correct address. If all of these directions as to service had been incorporated into the preceding sentence, it would have been long, involved and perhaps difficult to understand. The two sentences are definitely connected because the second sentence refers to "such notice", meaning the notice referred to in the previous sentence. It constitutes a definition of the written notice. Any other kind of written notice sent in some other way is not notice, because it differs from the definition of the substitute for personal service of notification authorized by Congress. This is emphatically true because, as we have shown, service is completed by mailing and not by delivery of the matter mailed by the postoffice.

The decision under review violates another well established rule of statutory construction, to wit: "When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode."

The Raleigh & Gaston R. R. Co. vs. Reid, 80 U. S. 269; 20 L. E. 570.

Botany Worsted Mills vs. U. S., 278 U. S. 282, 289; 73 L. E. 379, 385.

Paso Robles Merc. Co. vs. Commissioners of Internal Revenue, 33 F. (2nd) 653, 654.

Direction to serve by "registered mail" was equivalent to a specific denial of right to serve by "ordinary mail."

As to notice in general see *Infra,* Point IV.

If, however, it shall be found that the words contained in the statute on the subject of notice and the manner of its service are doubtful in any way, under well settled principles, it should be determined that the words are mandatory and not merely directory, because upon those questions depend matters of public interest and the rights of third parties, namely the contractors and their sureties. "The recognized rule is that when the act to be done concerns the public interest or the rights of third persons, even permissive words in the statute will be construed as mandatory."

People *ex rel.* Cayuga Nation vs. Land Commissioners, 207 N. Y. 42;

Vulcan Rail & Construction Co. Inc. vs. Co. of Westchester, 250 App. Div. 212, 220.

"There are undoubtedly many statutory requisitions intended for the guide of officers in the conduct of business devolved upon them, which do not limit their power or render its exercise in this regard of the requisitions ineffectual. Such generally are requisitions designed to secure order, system, and despatch in proceedings, and by a disregard of which the rights of parties interested cannot be injuriously affected. Provisions of this character are not usually regarded as mandatory unless accompanied by negative words importing that the acts required shall not be done in any other manner or time than that designated, but when the requisitions prescribed are intended for the protection of the citizen and to prevent a sacrifice of his property, and by a disregard of which his rights might be and generally would be injuriously affected, they are not directory but mandatory. They must be followed or the acts done will be invalid."

French vs. Edwards, 13 Wall. 506, 20 L. E. 702.

This question was directly presented and distinctly settled in the case of French vs. Edwards *(supra)*.

Lyon vs. Alley, 130 U. S. 177, 32 L. E. 899.

In the case of Vulcan Rail & Construction Co. vs. Co. of Westchester, *(supra)*, the court construed a provision of the New York State Lien Law on the subject of assignment of lien which reads as follows: "Every assignment of moneys or any part thereof due or to become due under a contract for public improvement shall contain a covenant by the assignor that he will receive any moneys advanced thereunder by the assignee as a trust fund", for certain uses and purposes defined.

N. Y. State Lien Law, sec. 25 (5).

An assignment had been executed which did not contain those provisions. It was held that the assignor by reason thereof was not protected in priority payment.

Since the foregoing was written a decision has been rendered by the Tennessee Court of Appeals under date of June 25, 1940.

Hibbler-Barnes Company vs. Mark K. Wilson & Company, (See appendix for opinion).

The Tennessee statute involved in that case is set forth in full in the opinion. *(Infra* page 48). It will be observed that the proposition there before the court is the converse of that involved in the case at bar, but the construction thereof made by the court and the reasons assigned therefor are exactly pertinent as

we see it. It will be observed that under the statute of Tennessee the contractor who furnishes the payment bond is liable to a laborer or materialman until he "gives a notice in writing by return-registered mail to any laborer or furnisher of material * * * that he will not be responsible therefor. * * *"

In the case at bar the liability is created by such a notice sent by registered mail. In principle the two situations are the same. The Tennessee court held that a notice in writing which otherwise might be sufficient did not operate to relieve the contractor from liability because it was sent forward by ordinary mail and not by "return-receipt-registered mail" notwithstanding the fact that the written notice thus sent by ordinary mail was actual and in fact received by the addressee.

Point IV.

Law as to Notice in General.

It has been long established in various state courts that where notification is required it must be actual and personal unless there is some specific statutory direction for a substitute.

20 Ruling Case Law, Sec. 4, p. 343 *et seq.*
Rathburn vs. Acker, 18 Barb. 393;
McDermott vs. Board of Police, 25 Barb. 635;
Mitchell vs. Clary, 20 Misc. 595, 646;
People *ex rel.* vs. L. & B. R. R. Co., 13 Hun. 211;
Boland vs. Sokolski, 56 Misc. 333;
Re Blumberg, 149 App. Div. 303;

Re Sullivan, 31 Misc. 1, 4; affd. 53 App. Div. 637;
Steinhardt vs. Bingham, 182 N. Y. 326, 328;
Beakes vs. DaCunha, 126 N. Y. 293;
Reed vs. Allison, 61 Cal. 461;
Moore vs. Bessie, 35 Cal. 184;
Harris vs. Minn. Inv. Co., 265 P. 306, 89 Cal. A. 396;
Smith vs. Smith, 4 Green (Iowa) 266;
Harbacheck vs. Moorland Tel. Co., 208 Ia. 552, 226 N. W. 171;
Allen vs. Strickland, 100 N. C. 225, 6 S. E. 780;
Werner vs. Commercial Cas. Co., 109 N. J. L. 119, 160 A. 547;
Am. Fire Ins. Co. vs. Banks, 83 Md. 22, 34 A. 373;
State vs. Second Judicial District Court, 38 Mont. 119, 99 P. 139;
People vs. Turnpike Co., 30 Cal. 182;
Clark vs. Adams, 33 Mich. 159.

The foregoing numerous cases are all to the same effect. The leading case most frequently cited in the others is Rathburn vs. Acker *(supra)*. The Federal courts have accepted the rule as well established.

Ex parte Caplis, 275 Fed. Rep. 980;
Lyon vs. Davis, 95 F (2nd) 103;
Haldane vs. U. S., 69 Fed. Rep. 819, 822;
In re Leterman Becher & Co., (C. C. A. 2nd Cir.), 260 Fed. Rep. 543.

The court has deemed the rule to be so well established that it has been stated without the citation of authorities to sustain it, saying:

"If notice was essential to charge them, actual notice should have been given, at least in the absence of a statute providing some means for constructive notice."

Burck vs. Taylor, 152 U. S. 634, 654, 38 L. E. 578, 585.

Point V.

Where a statute creates a cause of action in derogation of common right and prescribes a substituted service of notice, that substituted service must be exactly complied with in order to give jurisdiction. Such statutes are construed *strictissimi juris.*

"The manner and mode of service depends, of course, upon the character of the proceeding, as well as the statute by which the same is regulated. In general, however, where the notice is required by statute or rule of court, and the method of serving the same is not laid down, it is understood that there shall be personal service. And where the statutory proceeding is one in derogation of common right, as the involuntary sale of the property of an individual, the statute must be strictly construed and closely pursued."

Wade on the Law of Notice, 2nd Ed., sec. 1334, p. 664.

Service by mail is a substitute for personal notification. In the absence of the statute it would be wholly ineffectual, a mere gesture. Being statutory, it is just as important that the substituted service be in the exact manner prescribed as it is that it be within the time prescribed.

1 C. J. S. sec. 27, p. 1068, 1069;

Thatcher vs. Powell, 6 Wheat. 119, 5 L. E. 221.

The statute having provided a specific substitute for personal service of notice, in order to make that substituted service effective, it is necessary that everything prescribed in the statute be fully, exactly and completely performed, otherwise it is a different substitute from that authorized and constitutes a failure to serve at all.

25 Ruling Case Law, 982;
59 C. J. 984;
Hibbler-Barnes Co. vs. Wilson (see appendix).

The substitute in this case being by registered mail, the registration is a necessary part of that substituted service and until the communication is mailed and *registered*, the service is not completed.

20 Ruling Case Law, sec. 20, p. 356.
Ross vs. Hawkeye Ins. Co., 93 Ia. 222;
Schilling vs. Odiebak, 177 Minn. 90.

In addition to this, as we have shown in preceding Point III hereof, at the end of it, the specification of "registration" of the communication when mailed is equivalent to "the negative of any other mode" of mailing, just as effectually as if it had been expressed in specific words.

Point VI.

This rule of strict construction has been complied with, we believe, without exception in many cases of state and federal statutes of different nature from the one under consideration, where the right is made to depend upon a notice. It would extend this brief to altogether too large dimensions to attempt to cite all

such cases. We mention the following, however, as examples:

The New York State Employers' Liability Act, known as Section 201 of Chapter 31 of the Consolidated Laws, entitled Labor Law as amended by Chapter 352 of the Laws of 1910, though since repealed, was in full force in 1914, and so far as pertinent to the question here involved provided:

> "No action for recovery of compensation for injury or death under this article shall be maintained unless notice of the time, place and cause of the injury is given to the employer within one hundred and twenty days and the action is commenced within one year after the occurrence of the accident, causing the injury or death * * * The notice or demand may be served by post by letter addressed to the person on whom it is to be served at his last known place of residence or place of business, and if served by post shall be deemed to have been served at the time when the letter containing the same would be delivered in the ordinary course of the post. When the employer is a corporation, notice shall be served by delivering the same or by sending it by post addressed to the office or principal place of business of such corporation."

An action came before the Second Circuit Court of Appeals to recover under that law, in which a notice though in writing and sent by post was sent to the wrong address, namely to a branch office of the employer. The opinion of the court was written by Judge Ward, concurred in by Circuit Judges Lacombe and Rogers. In the course of the opinion it was pointed out that this Act:

> "Increases the common law liability of the master and that it makes conformity with its provisions

a condition precedent to the servant's right of action.

Next it is to be noted that actual knowledge by the master of everything prescribed by the act is immaterial. The legislature must, of course, have been aware that generally speaking the master knows all about such occurrences. Proof of this fact or even proof that the fullest information had been given verbally would amount to nothing. The notice must be given in writing. * * * We think the provision of the act must be strictly observed."

It was then pointed out that the principal place of business of the employer was Cornwall, Orange County, N. Y. The notice was directed to the defendant at Van Cortland Park, N. Y. where it had a branch office. The court said:

"Similarly notice not mailed in accordance with the section, though received, is not notice within the meaning of the act."

Mason & Hanger Co. vs. Sharon, 219 Fed. Rep. 526.

Judge Hand in his opinion found it impossible to distinguish this case in principle but contented himself with a refusal to follow it. (R. 70.)

The Workmen's Compensation Law of the State of Kansas provides:

"No proceedings for compensation shall be maintainable hereunder unless a written claim for compensation shall be served upon the employer by delivering such written claim to him or his duly authorized agent, or by delivering such claim to him by registered mail."

Laws of Kansas for 1927, Chapter 232, sec. 20.

The Supreme Court of Kansas in construing that statute said:

> "The fact that the statute prescribes the delivery of the written claim by registered mail as one of the ways of serving it might very properly and fairly come under the very general rule that it was the intention of the legislature to exclude all other ways of doing it by mail. If not, why designate registered mail? * * * The term 'shall be served' calls for a consideration as well as the term 'to be delivered'. Not everything that comes into one's possession by mail or otherwise can be said to be served upon him. The legislature in using these terms necessarily meant something more formal than what might happen to come to an employer by mail, and, therefore, with an apparently good reason for making a distinction limited such service so far as being done by mail to registered mail."
>
> Breedlove vs. General Baking Company, 138 Kans. 143;
>
> Klein vs. McCullough, 135 Kans. 593.

The other cases from Kansas cited by the Circuit Court of Appeals in this case (R. 69) and by Judge Knight in the District Court (R. 39) are easily distinguishable to such an extent that they are not authorities.

In Weaver vs. Shankland Walnut Company, 131 Kans. 771, the service was irregular but the insurance carrier acted upon it, made payments under it, thereby waiving all irregularities in the service.

The question as to the manner of service of the notice was not raised or discussed in either of the following cases:

Eckl vs. Sinclair Refining Co., 133 Kans., 285; Honn vs. Elliott, 132 Kans. 454.

The Circuit Court of Appeals for the Eighth Circuit in 1903 passed upon a Colorado statute of similar import. That statute provided that an employer should be liable to an employee for personal injuries "by reason of the negligence of any person in the service of the employer who has charge or control of any switch, signal, locomotive engine or train upon a railroad."

Colorado Session Laws 1893, page 129, c. 77.

The act further provided that "no action for the recovery of compensation for injury or death under this act shall be maintained unless written notice of the time, place and cause of the injury is given to the employer within sixty days after the occurrence of the accident. * * *"

Laws of the State of Colorado, 1893, Page 129, c. 77, sec. 2.

At the end of the opinion the court said:

> "Upon the record the failure of Lange to give the notice required by the Act of 1893 is admitted. Such failure is fatal to his case. The enforcement of the liability of the company was by the act which created it conditioned upon the giving of the notice. Without compliance with the condition there can be no enforcement of the liability."

Lange vs. Union Pacific R. Co., 126 Fed. Rep. 338, 342.

In another action in the Circuit Court of Appeals for the Eighth Circuit, it became necessary to con-

strue the federal revenue act of 1926, which provided "No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously assessed or collected * * * until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue * * *."

Revenue Act of 1926, c. 27; 26 USCA 1672-1673.

In that case no claim for refund had been filed. It was held that the filing of the claim was clearly a prerequisite to the action in court for the recovery of the tax and that, therefore, the action could not be maintained, citing many cases decided in the Supreme Court to sustain the proposition.

Lucky Tiger—Combination Gold Mining Co. vs. Crooks, 95 F (2nd) 885, 888.

In Massachusetts there is a statutory requirement that a sworn statement of claim must be filed with the County Treasurer or with the City or Town Clerk in order to permit a recovery. It has been held that an oral request made to the town counsel to bring suit against the surety was not a compliance with the law.

Smith Iron Works vs. Maryland Casualty Company, 279 Mass. 74.

In Connecticut a similar statute has been construed in the same way.

New Britain Lumber Co. vs. American Surety Company, 113 Conn. 1.

To further illustrate the rule and the universality of its application reference may be had to the following cases:

Texas Co. vs. Schriewer, 38 S. W. (2nd) 141;
Southern Surety Co. vs. Jenner, 212 Ia. 1027;
Constance vs. Lay, 122 Oh. St. 468;
Republic National Bank & Trust Co. vs. Massachusetts Bonding & Ins. Co., 68 F (2nd) 445;
Empire State Surety Co. vs. City of Des Moines, 152 Ia. 531;
Silver vs. F & D Co., 53 Pac. (2nd) 459 40 N. M. 33.

Construction of City and Village Charters.

Other instances where rights of action are dependent upon previous notice or some similar proceeding have arisen under various city charters in the State of New York, and we believe elsewhere, where provision is contained, as was in 1886 contained in the Buffalo City charter, to the effect "that no action or proceeding to recover or enforce any claim against the city shall be brought until the expiration of forty days after the claim shall have been presented to the common council."

Laws of 1870, Chapter 519, sec. 7, title 3.

Under this statute it was held clearly that presentation of the claim in the way provided for in the statute was a condition precedent to the right to commence any action and no recovery could be had in the absence thereof.

Reining vs. City of Buffalo, 102 N. Y. 308.

In the State of New York, it is now provided in Chapter 53 of the Consolidated Laws, sec. 44, that

in order to recover in a civil action no liability shall be asserted against the city "unless a claim therefor in writing, verified by the oath of the claimant, shall be presented" as in the act required. In a case where the affidavit of verification was not signed by the affiant, the court held that it was improperly verified and that no action could be brought by reason of the fact of that irregularity in the claim. The verification not being in the form required by the statute was no verification at all.

Ponsrok vs. City of Yonkers, 254 N. Y. 91.

In a similar situation under the same statute where the verification was not signed by the affiant, no right of action was created.

Rockwell vs. City of Syracuse, 257 App. Div. 92.

Under the village charter of the Village of Port Chester, Laws of 1868, Chapter 818 as amended by the Laws of 1894, Chapter 23, Title 7, section 16, is a similar provision quoted in full in the opinion of the case about to be cited. In that statute it will be observed that the claim is required to be presented to the president or treasurer of the village. The claim was presented to the village clerk. Recovery was not allowed upon any theory that the village officers had full knowledge of the whole transaction.

Rogers vs. Village of Port Chester, 234 N. Y. 182.

A similar rule has been applied to the charter provisions of New York City.

Lewis vs. City of New York, 278 N. Y. 517.

Mechanic's Lien Cases.

In statutes authorizing mechanic's liens the same construction has been followed in all cases so far as we can find.

New York State Statute on the subject of mechanic's liens, section 9 of the Lien Law, provides for the acquirement of a mechanic's lien when he shall have filed a notice containing certain facts, and then provides "The notice must be verified by the lienor or his agent to the effect that the statements therein contained are true to his knowledge except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true."

New York State Lien Law, section 9.

A case arose in which the notice of lien instead of being verified as commanded by the statute had attached to it a corporate acknowledgment. It was held that the lack of verification by the affidavit of the person verifying it was fatal.

Re Passero & Sons Inc., 237 App. Div. 638;
Dwelle Kaiser Co. vs. Frid, 233 App. Div. 427, 433.

In many other states besides New York similar lien laws have been construed in the same way, always so far as we can find to the effect that notice of the lien must be strictly in accordance with the statute authorizing the lien and served strictly in accordance with the directions for service found in the same statutes.

Nanz vs. Park & Company, 103 Tenn. 299.

The person claiming the benefit of the lien must always strictly bring himself within the provisions of the act. No liberality of construction will dispense with any of the requirements in that respect.

Thompson vs. Baxter, 8 Pick (92 Tenn.) 305.

In many states statutes have been adopted providing for substituted service upon nonresidents involved in an automobile accident within the state. An instance of such statutes is this:

> "The operation by a nonresident of a motor vehicle or motorcycle on the highway in this state shall be deemed equivalent to an appointment by such nonresident of the Secretary of state to be his true and lawful attorney, upon whom may be served the summons in any action against him growing out of any accident or collision in which such nonresident may be involved while operating a motor vehicle on such a public highway; and such operation shall be deemed a signification of his agreement that any such summons against him which is so served shall be of the same legal force and effect as if served on him personally within the state. Service of such summons shall be made by leaving a copy thereof with a fee of $2.00 with the Secretary of state or in his office, and such service shall be sufficient service upon such nonresident provided that notice of such service and a copy of the summons are forthwith sent by registered mail by the plaintiff to the defendant, and the defendant's return receipt, the plaintiff's affidavit of compliance therewith, and a copy of the summons and complaint are filed with the clerk of the court in which the action is pending."
>
> New York State Vehicle & Traffic Law, sec. 52.

Although the statute has now been amended, while it was in force as above written in 1931, it was held

that the requirements were that "the defendant's return receipt" be filed with the accompanying affidavit was essential to constitute legal substituted service.

Dwyer vs. Shalek, 232 App. Div. 780, 781.

The defect in that service was that the defendant refused to accept the papers from the postoffice or to sign the return receipt.

Point VII.

The alleged notice did not comply with the terms of the statute and is, therefore, a nullity.

The statute provides that a person in the situation of the use plaintiff "shall have a right of action upon the said payment bond upon giving notice to the said contractor". Then follow provisions upon the manner in which the notice shall be given.

Interrogatory No. 7 and Interrogatory No. 8 required the production of the written notice and a statement of the manner of its service (R. 27, fols. 80 and 81). Answers to those interrogatories specified that the notice was in writing, (R. 29, fol. 86) and a copy was attached. (R. 30 and 31.) Eliminating all other questions about the sufficiency of the notice, we find that it is addressed not to either of the principals in the bond, that is the contractors, but to one C. Leslie Weir, Project Engineer. (R. 30, fol. 89.) It is respectfully submitted that this was not notice to the contractors within the meaning of the Miller Act. It was a primary communication to the Project Engineer. The contractors before they would be charged with

notice must have one directed to them either in fact or in substance. This was neither. It did not purport to call anything to the attention of the contractors or make any demand upon the contractors, but simply invokes the best efforts of the Project Engineer to bring about payment of the money to the claimant from some source or other. The receipt of such a document, no matter how delivered, by the contractor might reasonably have been construed to be a courtesy copy and nothing more. The affidavit of Mr. Hallenbeck, submitted to the District Court upon his application for a summary judgment, is to the same effect as the answer to the interrogatories hereinbefore mentioned, except that it points out specifically that Mr. Weir was, as he purports to be, a representative of the government and not of the contractor. (R. 43, fol. 129.) The affidavit also sets out a little more in detail the manner in which the document was mailed. (R. 43 and 44.) The statement attached to the affidavit (R. 45-51) does not purport to have been furnished to the contractor but is merely a full statement of what might reasonably have been included in the notice if it had been intended to be a notice to the contractor. The carbon copy of the letter to the Project Engineer referred to in the affidavit and attached is the same as is attached to the interrogatories. (R. 43, 51 and 52.) No specific mention of this defect in the notice is pointed out in the opinion either of Judge Knight in the District Court (R. 36) or in the opinion of the Circuit Court of Appeals (R. 68). Judge Knight says "The notice itself consists of a letter directed to Fleisher Engineering & Construction Company." (R. 36.) This is not strictly correct because the letter is not directed to that company. While it is perfectly plain that the

statute intended the contents of this written notice addressed to the contractor to be quite informal, nevertheless a copy of a letter directed to some third person passes beyond the mere matter of informality and creates a deficiency in substance.

It is respectfully submitted, therefore, that the judgments of the Circuit Court of Appeals and of the District Court should be reversed, and that the defendant's motion for a summary judgment, dismissing the complaint for the foregoing reasons, should be granted.

FRANK GIBBONS,
Counsel for Petitioners,
618-630 Walbridge Bldg.,
Buffalo, N. Y.

APPENDIX.

TENNESSEE COURT OF APPEALS
EASTERN SECTION.

Decided June 25, 1940.

HIBBLER-BARNES COMPANY,
v.
MARK K. WILSON COMPANY, *et al.*

Hamilton County Equity. Hon. J. L. Foust, Chancellor.

Attorneys for Appellant: Wilkerson & Wilkerson, Chattanooga.

Attorneys for Appellees: Shepherd, Curry & Levine, Chattanooga.

The defendant, Mark K. Wilson Company, had the general contract to construct a school building at Soddy, Tennessee for use as an elementary school building. The Mark K. Wilson Company sub-let the job for plastering the building to the defendant Louis W. Vetter. Hibbler-Barnes Company furnished materials for the plastering job to said Louis W. Vetter in the amount of $817.38. The complainant filed its original bill in this cause against the Mark K. Wilson Company, the general contractor, Trinity Universal Insurance Company as surety on the bond of said Mark K. Wilson Company to guarantee payment for materials used in the construction of said building, and against Louis W. Vetter, sub-contractor, to collect for same.

Louis W. Vetter made no defense to the suit and final judgment was entered against him. He is not a

party to the appeal to this court. Mark K. Wilson Company and the Insurance Company resisted liability on the claim, interposing as a defense to same a letter written by the Mark K. Wilson Company to Hibbler-Barnes Company on May 19, 1939, the material portions of which follow:

> "Replying to yours of May 18th, with reference to material for Louis Vetter.
>
> We will be glad to receive duplicate invoices and pay part on account as the work progresses but cannot pay them in full or be responsible for them in full because we are having to advance pay-rolls to Mr. Vetter on this work.
>
> We will, however, at the completion of the job, make check to Vetter and yourselves for whatever balance there may be due him."

This letter was forwarded by ordinary mail and was received by Hibbler-Barnes Company on May 20th, 1939. At the time this letter was received materials in the amount of $232.80 had already been furnished, and thereafter materials amounting to the sum of $584.58 were furnished. The Chancellor allowed a recovery for the materials furnished prior to the receipt of this letter, and denied a recovery for all materials furnished thereafter. The complainant has appealed to this court from the decree so entered and has assigned errors to the action of the Chancellor in denying a recovery for all materials furnished.

There are no controverted facts in the case. The amount of the materials furnished is not in dispute. And only legal questions are involved. The first is the sufficiency of the letter in question as notice that the defendant would not be responsible for materials furnished to the sub-contractor, and second, whether or

not the mailing of the letter in the regular mail order, but not by return-receipt registered mail, is a sufficient compliance with the provisions of the statute to avoid liability. The statute upon which complainant relies, being Section 7955 of the Tennessee Code of 1932, is as follows:

> "No contract shall be let for any public work in this state, by any city, county or state authority, until the contractor shall have first executed a good and solvent bond to the effect that he will pay for all the labor and materials used by said contractor, or any immediate or remote sub-contractor under him, in said contract, in lawful money of the United States." * * * "In the event the contractor who has executed the bond gives notice, in writing, by return-receipt registered mail, to any laborer or furnisher of material or to any such immediate or remote sub-contractor, that he will not be responsible therefor, then such person who thereafter furnishes such material or labor shall not secure advantage of the provisions of this section, for materials furnished or labor done after the receipt of such notice."

As above set out the defendant sent the letter in question by ordinary mail, and not by return-receipt registered mail. The Chancellor was of opinion that the provisions of the statute with regard to the manner of giving the notice was directory, and that a substantial compliance with the provisions of same was all that was required. He found that the mailing of the letter by ordinary mail was actually received by complainant; that this constituted a substantial compliance with the provisions of the statute and was sufficient. This conclusion is challenged by appropriate assignment of errors.

So far as we have been able to find the provisions of with respect to the method of giving the notice have never been passed upon by the appellate courts of this state. However, the general rule in this connection as stated by Ruling Case Law is that, "Where a specific mode of giving notice is prescribed by statute that method is exclusive."

20 R. C. L., page 343, Sec. 4.

This statement of the rule has been approved by the Supreme Court of Tennessee in connection with the giving of notice of non-payment of checks, in construing requirement for notice to municipalities of accidents and to employers in compensation cases.

Payne v. State, 158 Tenn., 211.
White v. Nashville, 134 Tenn. 695.
City of Knoxville v. Fielding, 153 Tenn., 586.
Beech v. Keicher, 154 Tenn., 329.

The provisions of the statute are clear to the effect that no contract is to be let for any public work in this state by any city, county or state authority, until the contractor has first executed a good and solvent bond to the effect that he will pay for all the labor and materials used by himself, or any immediate or remote sub-contractor under him. The execution of the bond for insuring payment for materials furnished and labor performed is a condition precedent to the making of the contract between the contractor and the city, county or state agency. By the very terms of the undertaking in this case the defendant became obligated to pay to the complainant the value of the materials used by the sub-contractor which are sued for. It is insisted that this liability may be avoided by the

giving of actual notice without a strict compliance with the provisions of the statute. In other words it is insisted that the general rule applicable to the giving of notice prescribed by statute is not applicable to the provisions of the statute in question, but that the provisions of the statute have been met by the giving of actual notice. This insistence is based on the insistence that the method of giving the notice is directory and not mandatory, and that substantial compliance is all that is required to comply with directory provisions of a statute.

But we are cited to no authority where it has been held that a provision such as that involved here has been declared to be directory and not mandatory. In the absence of such authority we are inclined to follow the general rule. The legislative intent is the cardinal rule in the construction of statutes, and the intent is to be followed in construing statutes in the absence of some ambiguity or other impediment. In this particular statute the Legislature provided in no uncertain terms the method of giving the notice of non-liability. If it is to be held that the giving of notice by ordinary mail was sufficient compliance with the provisions of the statute, the effect of such holding would be that the giving of actual notice was all that is necessary. We think that this was not the intention of the Legislature. The giving of notice by return-receipt registered mail is far more impressive than ordinary mail, and will commend more attention. But the provisions of the statute constitute a sufficient reason for the rule of construction. Certainly it is not an unreasonable requirement, and we think courts would not be justified in saying that its requirements should

not be met. The Legislature appeared to make a distinction between ordinary mail, which under ordinary circumstances is sometimes difficult to prove, and return-receipt registered mail, which provides a complete chain of proof.

We think the letter written by the defendant failed to meet the requirements of the statute as to the giving of notice, and that the Chancellor was in error in so holding. We think the method of giving notice provided by the statute was exclusive, and that the letter in question by ordinary mail was not sufficient. There is some question as to the sufficiency of the content of the letter to put complainant upon notice that defendant intended to deny liability for the materials furnished. However, having reached the conclusion that the notice as given failed to satisfy the requirements of the statute in any event, it is not necessary to pass upon this question.

For the reasons stated the decree of the Chancellor will be reversed and a decree will be entered in this court for the full amount of $817.38 with interest thereon from September 30th, 1939, in the amount of $36.30, or a total of $853.68, against Mark K. Wilson Company, and Trinity Universal Insurance Company.

AILOR,
Judge.